Supreme Court, U.S.
FILED
DEC 6 1991
OFFICE OF THE CLERK

(6) (4) (3)

NOS. 91-543; 91-558; 91-563

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGHENY and THE COUNTY OF CORTLAND, NEW YORK

Petitioners,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy;
KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission;
THE UNITED STATES NUCLEAR REGULATORY COMMISSION;
SAMUEL K. SKINNER, as Secretary of Transportation; and
WILLIAM P. BARR, as United States Attorney General,

Respondents.

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' STATES OF WASHINGTON, NEVADA AND SOUTH CAROLINA BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did congressional enactment of the Low-Level Radioactive Waste Policy Act of 1980, and its 1985 Amendments, which ratify and implement the unanimous agreement of all the states of the Union to fairly allocate the responsibility for the nation's low-level radioactive waste disposal capacity among themselves, violate the Tenth Amendment or the Guarantee Clause, Article IV, § 4, of the United States Constitution?

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RESPONDENTS' STATES OF WASHINGTON, NEVADA AND SOUTH CAROLINA BRIEF IN OPPOSITION

WHAT THIS CASE IS REALLY ABOUT

The states of Washington, Nevada, and South Carolina (sited states) have been the hosts of the only operating low-level radioactive waste disposal sites since 1978. The disposal sites are located at Hanford in the state of Washington, Beatty in the state of Nevada, and Barnwell in the state of South Carolina.

In 1979, the state of Nevada twice temporarily closed the Beatty site due to the improper handling within the state of several low-level radioactive waste shipments being sent to the site.[1] In October 1979, similar transportation and packaging problems caused the governor of Washington to temporarily close the Hanford site.[2] The closures of the Nevada and Washington disposal sites caused the share of low-level waste being accepted in South Carolina to rise to 80 percent of the entire nation's low-level waste. Because of this result, the governor of South Carolina ordered the Barnwell site to only accept one-half the annual amount of waste that it was then receiving. The inadequacy of existing disposal capacity for low-level radioactive waste was at this time a major concern of both the sited and unsited states. A national disposal system with only three sites for waste from all 50 states was vulnerable to widespread health and safety crises.[3]

The sited states were particularly unhappy with the equities of the existing situation. The sited states believed it was unfair that they be required to provide disposal facilities for all 47 of the "unsited" states. In addition to the limitation imposed by the South Carolina governor in 1979, the voters in the state of Washington approved an initiative in 1980 that banned the disposal of out-of-state low-level radioactive waste at Hanford.[4]

In the wake of this crisis, Congress began to consider federal solutions to the problem. However, the states asked that Congressional action be deferred in order to allow the

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[1]H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 17, *reprinted in* 1985 U.S. Code Cong. & Ad. News at 3006.

[2]*Id.*

[3]*Id.*

[4]The initiative was declared unconstitutional *See Washington State Building and Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

states to develop a low-level radioactive waste policy. Congress agreed. Given this opportunity by Congress, the states acted quickly. The National Governors Association (NGA) created a task force to review and formulate state policy regarding low-level radioactive waste.[5] Another state-created organization called the State Planning Council on Radioactive Waste Management, recommended to President Carter that the national policy on low-level radioactive waste should be that every state is responsible for the disposal of low-level radioactive waste generated within its boundaries, and that states may enter into interstate compacts to carry out the responsibility. The National Conference of State Legislatures and the National Governors Association also adopted this recommendation. The NGA Task Force concluded that the siting of low-level radioactive waste facilities involved primarily state and local issues and should be resolved at those governmental levels.[6]

Thus the states recommended solving the problem of low-level radioactive waste disposal capacity on a regional basis, whereby several states would enter into an interstate compact to establish a new disposal facility for waste generated within the Compact region. In accordance with the states' recommendations, Congress enacted the Low-Level Radioactive Waste Policy Act of 1980, which was codified at 42 U.S.C. §§ 2021b-2021d (1980 Act).[7]

The 1980 Act gave the regional Compacts the authority to restrict, after January 1, 1986, use of the regional disposal facility to waste generated within the region. In effect the unsited states were given a deadline of January 1, 1986 to establish their own regional disposal facilities.[8]

As the deadline approached, the states began to realize that finding sites within the unsited regions probably could

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[5]1985 U.S. Code Cong. & Ad. News at 3007.

[6]*Id.*

[7]*Id.*

[8]*Id.*

not be accomplished by January 1, 1986, although significant progress was achieved in developing regional disposal Compacts. Thirty-nine states had entered into compacts by the summer of 1985, but progress on achieving Congressional ratification of the compacts was slowed by the fact that only the Northwest,[9] Southeast,[10] and Rocky Mountain Compact[11] states would have had disposal capacity available as of January 1, 1986; the other non-sited states would not have had any place to send their waste for disposal after that date. The process envisioned in the 1980 Act was grinding to a halt, creating a crisis similar to that which had existed in 1979.[12]

The sited states threatened that they would close their facilities to all waste if Congress did not pass acceptable legislation by January 1, 1986. The states again under the auspices of the National Governors Association developed a compromise under which the states of Washington, South Carolina, and Nevada agreed to continue to accept all of the nation's low-level radioactive waste for an additional seven years in exchange for incentives and penalties that would better guarantee that new sites would be developed.[13] The state-generated and state-approved National Governors Association proposal served as the foundation for Congressional action.

The legislation required that the unsited states meet specified milestones during the interim access period from 1986-1992, in order for the waste generators within their borders to receive continued access to disposal facilities. The sited states would be permitted, on an annual basis, to

[9]The Northwest Interstate Compact includes Washington, Oregon, Idaho, Montana, Utah, Alaska, and Hawaii.

[10]The Southeast Compact includes South Carolina, North Carolina, Virginia, Tennesee, Mississippi, Alabama, Georgia, and Florida.

[11]The Rocky Mountain compact includes Nevada, Wyoming, Colorado, and New Mexico.

[12]*Id.*

[13]*Id.* at 3008.

cap the amount of waste disposed of at their facilities and they would also be permitted to impose fixed surcharges on any waste accepted for disposal from outside the region.[14]

The sited and unsited states strongly urged Congress to adopt these basic elements of the compromise. Widespread state support allowed these elements to remain in the bills which passed each house and in the final legislation. On December 19, 1985, the low-level radioactive waste disposal crisis was averted when the compromise legislation passed unanimously as the Low-Level Radioactive Waste Policy Amendments Act of of 1985 (1985 Amendments Act) and seven compacts were ratified under the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act.[15]

Under the 1985 Amendments Act, significant progress has been made by several states and Compacts in developing new low-level radioactive waste disposal capacity. The states of California, Arizona, North Dakota, and South Dakota have formed the Southwest Compact, with California as the host state. Illinois is the host state of the Central-Midwest Compact, made up of Illinois and Kentucky. Nebraska is the host state of the Central Compact, which includes Nebraska, Kansas, Oklahoma, Arkansas, and Louisiana. The Appalachian Compact with Maryland, Delaware, West Virginia, and Pennsylvania is siting a disposal facility in Pennsylvania. Ohio is the host state of the Midwest Compact, which includes Ohio, Indiana, Missouri, Iowa, Minnesota, and Wisconsin. Texas is a "go-it-alone" state, developing its own disposal site without a regional compact. Each of these Compacts and states have made significant progress toward development of operational low-level radioactive waste disposal facilities in compliance with the 1985 Amendments Act. California, Nebraska, and Illinois have submitted license applications for their disposal facilities to the Nuclear Regulatory Commission.

[14]*Id.* at 3008-3009.

[15]131 Cong. Rec. H38115-38120; S38403-38425.

California expects its new disposal facility to be operating before the end of 1991.

In addition, pursuant to the contracting provision of the 1985 Amendments Act, the Northwest Compact and the Rocky Mountain Compact have negotiated a proposed agreement whereby the states of Nevada, Wyoming, New Mexico, and Colorado will have access to the disposal site located in Washington after December 31, 1992. This agreement furthers the 1985 Amendments Act policy to regionalize disposal capacity.

The probability that the 1985 Amendments Act process will result in the orderly development of new low-level radioactive waste disposal capacity throughout the nation has been central to the sited states' decision to provide continued access to the disposal sites for the disposal of low-level radioactive waste generated outside the sited states, pursuant to the 1985 Amendments Act.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS MISCHARACTERIZE THE ISSUE IN THIS CASE

In their petitions, the state of New York and the two counties characterize the issue as if Congress directed the states to be responsible for the disposal of low-level radioactive waste. The Petitioners try to create the impression that such responsibility was foisted upon unwilling states by the federal government, or that the states were commandeered by Congress to assume this responsibility. This characterization is inaccurate. *See supra*, pp.1-5. Both the 1980 Act and its 1985 Amendments are more properly characterized as a voluntary agreement among the states to be responsible for the disposal of low-level radioactive waste on a regional and equitable basis.[16] The Court of Appeals' opinion neatly and properly characterizes these laws as:

> paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics.

State of New York v. United States, 942 F.2d 114, 119 (2nd Cir. 1991).

The states are entitled to enter into agreements among themselves which can then be ratified by Congress in order to be enforced in the state and federal system. The states unanimously agreed to assume the responsibilities and liabilities the state of New York now claims were foisted upon it by Congress.

II. THE CIRCUIT COURTS OF APPEAL HAVE CONSISTENTLY AND PROPERLY APPLIED GARCIA AND BAKER

In their petitions, the state of New York and the two counties ask this Court to review the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The petitioners' theory is that the 1985 Amendments Act interferes with New York's sovereign powers and thus violates principles of federalism under the Tenth Amendment of the United States Constitution.[17]

The Second Circuit properly deferred, under the Tenth Amendment, to the agreement of all the states, including New York, which supported the national political process in creating the Low-Level Radioactive Waste Policy Amendments Act of 1985. The Petitioners fail to show that the Sec-

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[16]The legislative history of the 1985 Amendments Act and 1980 Act distinguishes this case from *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1979), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 U.S. 99 (1977).

[17]Although the Petitioners claim that the Guarantee Clause, Art. IV, § 4, of the United States Constitution is also violated, this Court has consistently held that challenges to legislation based on the Guarantee Clause are not justiciable. *City of Rome v. United States*, 446 U.S. 156, 182 n. 17 (1980); *Baker v. Carr*, 369 U.S. 186, 228-29 (1962).

ond Circuit is out of step with the Tenth Amendment analysis of its sister circuits or this Court.

The Tenth Amendment limits on Congress' authority to regulate the states were set out by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). "*Garcia* holds that the [Tenth Amendment limits on Congress' authority to regulate state activities] are structural, not substantive, *i.e.*, that states must find their protection from Congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, 485 U.S. 505 (1988).

This Court in *South Carolina v. Baker* went on to state that

> although *Garcia* left open the possibility that some extraordinary defects in the national political process might render Congressional regulation of activities invalid under the Tenth Amendment,* * * nothing in *Garcia* or the Tenth Amendment authorizes courts to second guess the substantive basis for legislation. Where * * * the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.

Id. at 512-513. The court observed that

> South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.

Id.

The United States Court of Appeals for the Ninth Circuit recently construed the Tenth Amendment consistent with both *Garcia* and *Baker* in a case dealing with the siting of a disposal site for high-level nuclear waste in *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1105 (1991). In that case, Nevada argued that

> because Nevada was not represented on the House and Senate Conference Committee on the Omnibus Budget Reconciliation Act of 1987 when the 1987 [Nuclear Waste Policy Act] amendments were approved, it was deprived of its 'right to participate in the national political process' and 'was singled out in a way that left it politically isolated and powerless.'

Id. at 1556 (quoting Petitioners' Opening Brief at 40, quoting *South Carolina v. Baker*, 485 U.S. at 512).

The Ninth Circuit Court of Appeals rejected Nevada's arguments and focused on the national political process in the factual setting presented:

> Nevada cannot point to any defect in the political process that led to the enactment of the 1987 NWPA Amendments. As the Secretary points out, the Tenth Amendment does not protect a state from being outvoted in Congress. * * * Nor can Nevada complain that its lack of representation on the Conference Committee created a defect in the political process. To the extent that Nevada asserts that lack of representation created a defect in the political process as contemplated by *South Carolina v. Baker*, it cannot succeed in light of the plenary consideration given to the Omnibus Budget Reconciliation Act of 1987.

Id. at 1556-1557.

Based on the foregoing, it is clear that *Garcia* properly limits courts to an examination of the national political process "in the factual setting" presented, in order to determine whether Congress has transgressed the Tenth Amendment in the exercise of its Commerce Clause powers. *See Garcia*, 469 U.S. at 556. That is, *Garcia* permits a procedural examination of the national political process and not a substantive review of Congressional actions under a *Garcia* exception.

In this case, rather than being denied the opportunity to participate in the national political process, the state of New York actively sought the legislative consensus that became the 1985 Amendments Act. The specific views of the state of New York were aired during Congressional hearings on the Act. In particular on March 7, 1985, Mr. Charles R. Quinn, Deputy Commissioner for Policy and Planning of the New York State Energy Office, testified

> New York State supports the efforts * * * to resolve the current impasse over Congressional consent to the proposed low-level radioactive waste compacts * * * New York State has been participating with the National Governors Association * * * in an effort to * * * reach a consensus between all groups.[18]

According to Mr. Quinn's testimony, one of the "major points which [New York] believes must be incorporated within any Congressional Act on this matter" was "appropriate penalties * * * for failure to meet designated milestones."[19]

The take-title penalty provision was devised by the Senate Environment and Public Works Committee and accepted by the NGA Task Force and the states[20]. New York State was not isolated when Congress added that provision to the 1985 Amendments Act. Senator Moynihan of New York was a member of that committee. Just before passage of the 1985 Amendments Act, Senator Moynihan strongly supported the bill

> Mr. President, the low-level nuclear waste bill before us is a well-balanced compromise, and a most necessary one. Without clear action by the Congress, the governors of the three states that have been disposing of all of our commercial low-level nuclear waste have threatened to shut down the disposal sites in their states. I cannot say that I blame them. * * *
>
> I am pleased to report that this complex bill meets those conflicting needs very well.* * *
>
> The timetables required by this measure are firm and realistic. It is indeed an equitable approach for all concerned, and I am pleased to support it.[21]

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[18]Amendments to the Federal Low-Level Radioactive Waste Policy Act of 1985: Hearings on HR 1083 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 99th Cong., 1st Sess. 197 (1985).

[19]*Id.* at 197-198

[20]Although the Appellants challenge the Amendments Act as a whole, they focus especially on the "take title provision," 42 U.S.C. § 2021e(d)(2)(C) which requires states to take title to the waste if they have not made arrangements for a disposal site by January 1, 1996. *See 131 Cong. Rec. S38405.*

[21]131 Cong. Rec. S38423.

No member of the New York State Congressional Delegation opposed the take-title provision, and the bills containing the penalty were unanimously passed by both the Senate and the House by voice vote.

The Petitioners' constitutional challenge to the 1985 Amendments Act is an attempt to continue to reap the benefits of the compromise agreement by the sited states to continue to accept out-of-region wastes until 1993, without New York accepting the burdens of developing waste disposal capacity to which it had agreed in 1985. The state of New York licenses the use of radioactive materials for various beneficial uses as an agreement state under the Atomic Energy Act. New York obtains the benefits of the use of these nuclear materials, and pursuant to the 1985 Amendments Act continues to shift the burden of disposal onto the sited states. New York would disrupt the compromise agreed to by the states in 1985 to share that burden and which was incorporated into the 1985 Amendments Act. If the 1985 consensus is to be revisited, the proper forum for such a process is among the states' elected representatives in Congress and not the federal courts.

> Negotiation and agreement with congressional, rather than judicial, supervision has long been the preferred method, provided by the Constitution, for resolution of interstate and sovereign disputes. When reviewing the complex provisions of the [1985 Amendments Act], courts should take particular note of this traditional preference.[22]

The 1985 Amendments Act is a fair and reasonable compromise developed among the states and enacted through the national political process. The Petitioners fail to show that they were denied an opportunity to participate in the national political process that brought about the leg-

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[22]Berkovitz, *Waste Wars: Did Congress Nuke State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harvard Env. L. Rev. 437, 475-476 (1987).

islation at issue. The Petitioners also fail to show that the Courts of Appeal have inconsistently applied the *Garcia* and *Baker* tests.[23]

The 1980 Act and its 1985 Amendments Act is an example of federalism operating at its highest and best level. The Tenth Amendment does not prohibit states from agreeing among themselves to solve a national waste disposal problem. The 50 sovereign United States participated in the national political process to forge a consensus to solve a serious problem that affects all the states—the safe disposal of low-level radioactive waste.

CONCLUSION

For the reasons given above, the Petition for a Writ of Certiorari should be denied.

DATED this 5th day of December 1991.

Respectfully submitted,

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[23]Even if this Court were inclined to revisit *Garcia* and *Baker*, in light of the legislative history of the 1980 Act and its 1985 Amendments this case does not present a promising vehicle to do so.